should bear the burden of proof on that issue. Such an allocation of the burden of proof is consistent not only with the statutory language favoring interconnection, but also with the fact that much of the relevant information as to network design and costs is in the possession of the ILECs. Finally, the Commission should not allow the ILECs to delay the process by introducing questions of "economic" feasibility into the determination of "technical" feasibility. The former issue may be relevant to pricing issues, but Congress, which knew the difference, chose to make technical feasibility the criterion for interconnection.

B. The Commission Should Specify Minimum Unbundling Requirements, and Permit the States To Require Additional Unbundling.

Section 251(c) (3) requires each incumbent local-exchange carrier to provide requesting telecommunications carriers with "access to network elements on an unbundled basis . . ." Moreover, the unbundled network elements must be provided in a manner "that allows requesting carriers to combine such elements in order to provide such telecommunications service."

Congress' desire to provide potential entrants with broad unbundling options is also reflected in the breadth of the statutory definition of "network element" which provides:

> "The term "network element" means a facility or equipment used in the provision of telecommunications service. Such term also includes features, functions and

> capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing or other provision of a telecommunications service."[6]

The statutory requirement that ILECs offer unbundled access to the local network represents another congressional decision to allow potential entrants, rather than the ILECs, to choose the best means of new entry, subject only to considerations of technical feasibility and the entrant's willingness to pay a "reasonable and non-discriminatory" price.

In view of the policy objectives of Congress as manifested in the statutory language, we think that the Commission should seek to maximize the options of potential entrants to purchase unbundled network elements. Congress knew that the rapid new entry that it sought to promote would be dependent in many cases on the entrant's ability to acquire facilities from the ILEC. But, Congress also recognized that not all entrants would need access to the same types of ILEC facilities in all markets. In some cases, rapid entry would only occur if a potential entrant could resell an ILEC's service or purchase access to most or all of its network elements. And, the statute affords entrants those prerogatives. In other cases, an entrant may only require access to a small part of the local network elements, being able to supply the balance of the needed facilities itself or through third parties. In either case, the statute allows the entrant to effectuate its own

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[6] Section 3 (45) of the 1996 Act.

judgment as to the most efficient manner of entry, rather than being constrained by an ILEC's determination of the bundle of network elements it is willing to offer. By allowing entrants to make these critical choices, the statute promotes both rapid entry and diversity of service offerings, two important features of the competitive framework envisioned by Congress for the benefit of consumers.

In light of this statutory background, the Department supports the Commission's decision (Notice ¶¶ 92-116) to require unbundling of local loops, at the sub-element level, local switching capability, local transport and special access, databases and signaling systems, as well as the network elements discussed in Paragraph 116 of the Notice.[7] At this stage, we leave to others the task of commenting on the specific levels of sub-element unbundling that is technologically feasible at this time. The statutory goal, however, is to require as much unbundling as is technologically feasible, and the Commission should, at the outset, establish broad rules to that end. Moreover, the states should be allowed to require additional unbundling, on a compensated basis, unless the Commission receives persuasive evidence that allowing the states such authority would endanger network reliability or retard entry.

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[7] In Paragraph 116, the Commission proposes to require the unbundling of subscriber numbers, operator call completion services and "information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service".

C. The Commission Should Not Allow Reciprocal Interconnection or Unbundled Access Obligations to Be Imposed on Non ILECs.

In Paragraph 45 of the Notice, the Commission solicits comments on whether obligations that are imposed by the Act on ILECs should be imposed on other parties to an agreement with an ILEC so that the obligations are reciprocal. The Department opposes any proposal to impose mandatory duties to deal, beyond those duties deemed necessary by Congress, on parties that lack significant market power. One of the principal features of a competitive market place is that parties generally have a right to differentiate their prices, products or services to make them more attractive to consumers. That right spurs firms to make the investments and take the risks that provide the creative energy that drives competitive markets. Thus, antitrust generally recognizes a party's right to refuse to deal with potential rivals.[8] Only where a firm or group of firms has attained market dominance through utilization of an asset that can not be replicated at reasonable costs have the antitrust laws required mandatory dealing.[9] By definition, it is unlikely that new entrants into local telephone markets will possess the kind of market power or control of an essential facility that would

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[8] United States v. Colgate & Co., 250 U.S. 300 (1919), and Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S 585 (1985).

[9] Contract MCI Communications Corporation v. AT&T, 708 F.2d 1081 (7th Cir.), cert. den. 464 U.S. 891 (1983) with McKenzie v. Mercy Hospital, 854 F.2d 365, at 370 (10th Cir. 1988) and Alaska Airlines v. United Airlines, 948 F.2d 536 at 544-46 (9th Cir. 1991).

justify, under general competition principles, subjecting them to mandatory unbundled access obligations.

We are unaware of any provisions in the 1996 Act that evidences a congressional desire to make such a significant departure from normal antitrust or competition policy with respect to the obligations referenced in Paragraph 45 of the Notice. On the contrary, imposing such reciprocal obligations on new entrants would be anti-competitive and thus inconsistent with the pro-competitive deregulatory thrust of the Act. Such obligations would undermine a potential entrant's investment incentives. An entrant might be dissuaded from making a facilities investment in the first place, if it knew that it would be forced to share with an ILEC the cost or service differentiation advantage that it would gain from the investment. This could delay or frustrate the type of entry -- facilities-based -- that would provide the greatest challenge to the ILEC's market power. The justification for imposing reciprocal obligations -- that it facilitates negotiations between ILECs and new entrants (Notice ¶ 45) -- hardly supports the proposal. Rather it indicates the belief that an ILEC will be less obdurate in negotiation if it is allowed to limit a new entrant's potential ability to differentiate its price or service offerings from that of the ILEC. Such an outcome, however, would be anticompetitive. It purchases speed of negotiation with the coin of forsaken competition. Such a bargain finds no support in either the language or policy of the 1996 Act.

D. The Commission Should Specify Principles Governing the Prices That ILECs May Charges For Facilities and Services Provided To Their Competitors.

The Department supports the Commission's determination (Notice ¶¶ 117, 118) that a reasonable reading of sections 251 and 252 of the Act reveals a Congressional desire to have the Commission establish pricing principles to guide the states in establishing rates in arbitrations and in reviewing ILEC statements of generally available terms and conditions. Section 251(d) directs the Commission, within six months, to "complete all actions necessary to establish regulations to implement the requirements of this section". Among the "requirements" of section 251 are that interconnection, unbundled access, and collocation be provided at "just, reasonable and non-discriminatory" rates, terms and conditions. *See* sections 251(c)(2), (c)(3), and (c)(6). Under section 252, the states have the responsibility of ascertaining the reasonableness of interconnection and access rates in individual arbitrations and ILEC statements of general availability. There is nothing in the language of either section 252 or 251, however, which expressly precludes the Commission from establishing pricing principles or parameters for utilization by the states in individual proceedings. Nor are we aware of anything in the legislative history that precludes the Commission from promulgating pricing principles or parameters as part of the "regulations to implement the requirements of section 251(d)." Indeed, in view of the importance of the reasonable rate requirements of various provisions of section

251, it could be argued that the Commission would be derelict in its statutory duty to facilitate achievement of Congress' goal of promoting rapid competitive entry into local telephone markets if it did not utilize its pricing experience and expert resources to provide guidance to the states and reviewing courts to better enable them to determine whether rates for interconnection, unbundled network elements and co-location are just and reasonable under the new cost-based principles adopted in the statute. The Commission's proposal would not infringe on the states' role under the Act. The states would continue to have the critically important role of determining the reasonableness of individual ILEC rates. Since the language of the statute and its legislative history clearly envision complementary roles for the Commission and the states, the Commission's proposal to issue principles or parameters for applying the new cost-based principles as part of the initial regulations required by Congress is consonant with the statutory framework and vital to secure the consumer benefits that would be afforded by enhanced competition.

The Commission's proposal to articulate pricing principles certainly would advance the statutory goal of promoting rapid competitive entry. We share the Commission's view (Notice ¶ 119) that its articulation of pricing principles and/or parameters would lower barriers to entry by increasing the predictability of rates and thereby facilitate negotiation, arbitration and review of agreements between ILECs and new entrants The history of telecommunications over the last thirty years has been marked by long, contentious negotiations in which incumbent dominant providers used a variety of delaying tactics at the negotiating table to impede entry or hobble potential rivals. Such delaying tactics were used at both the federal and state level To avoid a repetition of that scenario, the 1996 Act requires the Commission to promptly issue regulations to promote the expeditious entry into local telephone markets. The Commission's proposal to establish pricing principles and/or parameters as part of those initial regulations in order to guide the states, reviewing courts and the parties to individual negotiations is well designed to serve that statutory goal. Indeed, since Congress has directed that traditional rate-of-return and rate-based regulation be eschewed in favor of cost-based pricing, the failure of the Commission to establish general pricing principles for application by the states would very likely produce divergent state policies as they struggled to apply new cost-based pricing principles to individual cases. By reducing the possible divergence in state pricing regulation, the Commission's proposal would reduce another potential barrier to entry by new entrants who desire to implement a national or regional competitive entry strategy. The articulation by the Commission of broad pricing principles would also greatly simplify the arbitration duties of the states, who otherwise would be forced to resolve many complex pricing issues.

III. THE COMMISSION SHOULD REQUIRE THE PRICE OF UNBUNDLED NETWORK ELEMENTS TO BE BASED ON TOTAL SERVICE LONG RUN INCREMENTAL COSTS.

A. Total Service Long Run Incremental Cost.

In adopting standards governing the prices that ILECs may charge for the provision of unbundled network elements, the Commission should require that such prices reflect the forward-looking, economic costs of such elements. The total service long run incremental cost ("TSLRIC") of each element is an appropriate standard in this context. The TSLRIC methodology would price network elements at the long-run, forward-looking economic costs of the particular network element, given the efficient provision of all other network components by the ILEC. This standard would be "forward looking" in that it would be based on the best generally available technology, current input prices, and economic cost-minimization. It would be "long run" in that it would include the forward looking capital costs necessary to provide the element. It would define and utilize the network element as the appropriate "increment," and its added cost would be the added economic cost of the element conditioned on the provision of other network components.[10] As we discuss below, TSLRIC rates may need to be adjusted to permit recovery of forward-looking joint and common costs that may not be included in the sum of element-by-element TSLRIC rates.

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[10] This concept is different from stand-alone cost, which is the total cost of providing an element in isolation from all other elements.

B. TSLRIC is Consistent with the Telecommunications Act.

At the outset, we note that this pricing standard is fully consonant with, if not required by, the language of the Telecommunications Act. Section 252(d)(1) provides that ILEC rates for interconnection and network elements shall be "based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element," be "nondiscriminatory," and "may include a reasonable profit." The Commission has tentatively concluded that section 252(d)(1) of the Act "precludes states from setting rates by use of traditional cost-of-service regulation, with its detailed examination of historical carrier costs and rate bases" (Notice ¶ 123).

C. The Choice of a TSLRIC Standard Is Consistent With Ensuring Competition.

The Commission's tentative conclusion that cost-of-service regulation is precluded is not only legally justified, in our view, but is also necessary to effect the Act's primary goal of securing effective and efficient competition. Pricing based on TSLRIC is best suited to ensure efficient and effective entry, efficient production of end services, competitive pricing to end users, and the avoidance of anticompetitive behavior by ILECs to preserve their market power.

This pricing standard is appropriate, first, because it simulates the prices for network elements that would result if there were a competitive market for the provision of such elements to other carriers. In such a market, competition would drive prices to forward-looking costs, even if such costs were lower than a firm's historical costs. Thus, in a direct sense, the adoption of a TSLRIC standard will prevent ILECs from continuing to exploit their market power -- by charging more than competitive prices for network elements -- at the expense of their competitors who are dependent on ILEC facilities.

Second, a pricing standard based on TSLRIC will result in the creation of the "right" investment incentives for competitive facilities-based entry, rather than distorting the entrant's "make or buy" decision with respect to the network element. If network elements are priced below their true economic cost, entrants would be artificially encouraged to buy that element from the incumbent, rather than construct their own facilities. Facilities-based entry in that element would be discouraged or precluded altogether. If the ILEC's network element is priced above its true economic cost, entrants would face higher costs of entry, because either they must purchase the element at above cost prices or must waste resources by substituting more costly elements of their own for the less costly (but higher priced) elements of the ILEC. Efficient entry (i.e., entry at minimum cost) into downstream products would be deterred or precluded. The likely result of pricing errors in either direction is that competition on the merits would be impeded.

The use of this pricing standard is particularly important here because of the possibility that there will not be facilities-based competition for all elements, in all areas, in the immediate future. The efficiency of TSLRIC pricing does not rest on the assumption that all network elements will eventually be competitive, but TSLRIC will create incentives for the market to move in that direction to the maximum extent feasible, while preserving opportunities for competition even if some network elements prove to be resistant to competition.

Third, TSLRIC pricing for network elements will likely lead to lower prices to consumers. The direct impetus to lower consumer prices is straightforward. In most cases, we expect TSLRIC prices for elements to be lower than prices based on the historical costs of the ILECs. If so, these lower costs to entrants will enable them to offer lower prices to consumers, and will generate competitive pressure on ILECs to lower their prices as well. But TSLRIC pricing may provide consumer benefits indirectly, as well. If the prices that competing carriers pay for their inputs are distorted from the true economic cost of those inputs, those prices will lead carriers to choose technologies that will minimize their use of overpriced but lower cost inputs, thus impairing the quality or increasing the cost of their service offering.

Finally, TSLRIC pricing will minimize the opportunities for ILECs to engage in anticompetitive behavior that will impede competition from their rivals. If network element prices are based on the ILECs' historic costs, rather than forward looking economic costs, the well-recognized opportunities to engage in anticompetitive cross subsidization will infect the emerging competitive process. By misallocating costs from competitive activities to activities that supply "captive" customers, the ILEC can raise the price of network elements to the captive customers, and escape having to recover those costs from the competitive activities.

Moreover, if costs are misallocated to network elements used by rivals, or if noneconomic costs of any kind are assigned to network elements used by rivals, this would lead to a reduction in competition from those rivals. Opportunities to use prices to raise rivals' costs are minimized by pricing at economic cost.

Pricing above forward looking economic costs also would subject competitors to substantial risks of a "price squeeze." In competing against entrants to sell services to end users, the real cost of an input (i.e., a network element) for the ILEC will be its forward looking economic cost, and it can set its prices to the consumer accordingly. But for the entrant against whom the ILEC competes, the cost of the element will be the price charged for it by the ILEC. If this price is above economic cost, the entrant is placed at an artificial competitive disadvantage arising from its dependence on, and the ILEC's exploitation of, the incumbent's market power. If the difference between the element's price and its true cost is sufficiently large, the ILEC could engineer a "price squeeze" that could be fatal to the entrant's ability to compete.

D. Methodology -- the problem of Joint and Common Costs

TSLRIC rates for unbundled elements will not necessarily contain all of the joint and common costs associated with the entire network. However, an important property of TSLRIC rates based on physical elements is that unrecovered joint and common costs are likely to be much lower than a TSLRIC standard based instead on the cost of providing services. A number of different services are sometimes optimally provided over the same shared physical facility, potentially creating common costs between those services. Thus, using a standard based on the additional costs of providing services is likely to lead to an under-recovery of costs in this situation. Using TSLRIC based on physical elements greatly reduces or eliminates the problem.

By appropriately choosing a set of network elements that represent discrete physical facilities, TSLRIC prices are more likely to exhaust forward-looking economic costs. By minimizing the remaining joint and common costs, the possibly arbitrary allocation of these costs to various network elements is reduced, leading to more efficient pricing of network elements. While the Department does not endorse a particular methodology for allocating joint and common costs, if they are found to exist, we stress that the charges for network elements should not be burdened by any costs other than the TSLRIC and the forward-looking joint and common costs. Doing so would distort the price signals that lead to efficient production, entry, and exit. It would also depart from the important principle of competitive neutrality.

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For all these reasons, the Department believes that a TSLRIC pricing standard is best suited to accomplishing the purpose of the Telecommunications

Act to facilitate efficient and effective entry, and to bring the benefits of competition to consumers. Moreover, while we do not discount the difficulties of implementing such a pricing standard, particularly under the limited time that is afforded to the states to do so, the analysis contained in the Benchmark Cost Model by MCI, Sprint, US West, and NYNEX, and the more recent analysis by Hatfield Associates, may also facilitate its application.[11] Also, certain states have accumulated a substantial body of experience with economic cost concepts. The Commission should, of course, weigh carefully the practical administrative problems that may be associated with this and other pricing standards that it may consider. But because this standard is so well suited to the statutory goal of promoting competition, and because alternative pricing standards entail a substantially greater risk of impeding, rather than promoting, the emergence of competition, we urge the Commission to adhere closely to this standard.

IV. THE COMMISSION SHOULD CAREFULLY CONSIDER THE ADOPTION OF A "BILL AND KEEP" STANDARD AS AN INTERIM PRICING POLICY FOR TRANSPORT AND TERMINATION.

The Commission seeks comment on the appropriate pricing standards for the transport and termination of telecommunications traffic (Notice ¶¶ 239-243). The Department believes that TSLRIC pricing for transport and termination is appropriate, for the same reasons that it is appropriate with respect to the pricing

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[11] The Department offers no comment on the specific methodology or data contained in any of these studies.

of unbundled network elements. If transport and termination prices are set at levels significantly greater than TSLRIC, efficient entry will be discouraged.

The Commission should also consider, however, the possible advantages of bill and keep arrangements as an interim -- and perhaps permanent -- standard for pricing transport and termination.

Bill and keep arrangements effectively price termination at zero. Evidence presented in FCC Docket 95-185 shows that at least during off peak times, the incremental cost of terminating traffic on another network is close to zero. When the incremental cost of terminating traffic is zero, then bill and keep is equivalent to rates based on incremental costs. With costs near zero, the consumption and investment distortion resulting from a bill and keep arrangement may be small, and any distortion may be offset by the cost savings that would arise from eliminating the need to meter and bill traffic across networks.

It has been argued that the possible imbalance in traffic between carriers makes bill and keep an inferior solution. Much of this concern stems from the experience between LECs and Commercial Mobile Radio Service (CMRS) providers. The imbalance in the LEC/CMRS case is due to the different ways in which wireless and wireline services are used, not the relative sizes of the wireless and wireline network. There is no general reason to expect such imbalances to be based on network size if the services provided in the two networks are comparable.

The Department does not believe that, in the short term, bill and keep would have a deleterious effect on competition or the incumbent telecommunications carriers, and has clear advantages of being an easily determined and administrable standard. There appears to be ample evidence that bill and keep is being used successfully between telecommunications carriers today. In particular, these arrangements are used by neighboring LECs to exchange traffic.

The most significant unresolved issue concerning the appropriateness of a bill and keep standard is whether, as a long term standard, it would adequately compensate carriers for incremental costs incurred at peak traffic times. If so, such a standard in the long run could lead to underinvestment in telecommunications plant and overconsumption of the service. If, in the long run, the ILECs can demonstrate that continuing use of bill and keep creates these problems then they should be permitted to propose rates that are consistent with total service long run incremental cost.

V. REGULATORY RESTRICTIONS ON ENTRANTS' PURCHASE OR USE OF ILEC FACILITIES AND SERVICES WILL IMPEDE ENTRY, AND SHOULD NOT BE IMPOSED BY THE COMMISSION.

In seeking to promote the development of local competition, the Telecommunications Act of 1996 imposes on ILECs the obligation to provide a variety of facilities and services to firms that wish to compete in exchange and exchange access markets. These obligations reflect Congress' recognition that facilities-based competition necessarily will develop incrementally. The construction of ubiquitous networks by new competitors will require vast amounts of capital and substantial time. Until their own networks are fully deployed, entrants will be unable to offer meaningful competition unless they have access to facilities and services of the incumbent monopolist; and if entrants are denied such access, it is doubtful that they would undertake the costs and risks of attempting to enter on a significant scale.

Thus, the Act establishes for entrants the right to purchase, on an a la carte basis, a wide variety of facilities and services of incumbent LECs. This right -- bounded by the concepts of technical feasibility and economically appropriate pricing -- is intended to provide flexible opportunities for entry by a wide variety of firms using a variety of entry strategies. Cable television providers, wireless carriers, interexchange carriers, utilities, competitive access providers, and others will have the opportunity to purchase those ILEC facilities and services that they need -- without compulsion to purchase other facilities and services that they do not need -- to provide, using efficient technology, attractive service offerings to consumers.

The Department's numerous investigations into the factors affecting the development of local telecommunications competition suggest that this approach is essential to the development of such local competition. Reducing entry barriers into local markets by permitting resale and cost-based access is much more likely to lead to the greater development of facilities-based competition than would occur absent such access and resale opportunities.

There are several interrelated reasons that support this conclusion. First, the technologies that may be able to provide full facilities-based competition (particularly for residential customers) are still in the final stages of development and thus may not be ready for full scale deployment soon, the time frame envisioned by Congress for opening local markets to competition. Moreover, the Department is convinced, on the basis of its investigations, that all of the potential competitors in these markets believe that the first firm to offer bundles or packages of services -- including local, long distance, wireless, and video services or some combination thereof -- will derive a substantial "first mover" competitive advantage from doing so. If potential competitors are not able to address the market when the race starts, the established local and interexchange carriers may sign up customers with packages and bundles of local, long distance, cellular, and video services making subsequent entry all the more difficult. Under such circumstances, an important phase of competition will be lost before new competitors have the time to put their own facilities in place.

Second, the deployment of competing local exchange networks is very capital intensive and the availability of capital to deploy such networks may depend on an entrant's ability to demonstrate the capability, through resale or access to some number of network elements, of actually acquiring customers for local services in competition with the ILECs. The availability to new competitors of unbundled network elements, particularly the bottleneck local loop, should greatly increase their ability to enter local markets quickly and establish a customer base that can be used to justify and finance the deployment of a facilities-based network. In the meantime, although not as potent a source of competition as completely facilities-based competitors, these new entrants should nonetheless be able to exert substantial competitive pressure on the ILECs thereby limiting their ability to harm consumers by effectively discriminating against interexchange carriers and other competitors.

The Commission has requested comment on whether it should impose a variety of regulatory restrictions that would limit the ability of competitive providers of local exchange and exchange access to obtain or to use certain facilities and services of ILECs. Such exchange access services may be either intrastate or interstate in nature. Notice ¶¶ 162-164. Such regulatory restrictions (addressed specifically below) are advocated by ILECs on a variety of grounds. In the Department's view, however, these restrictions have important features in common with one another: they would raise the cost of entry (by limiting entrants' opportunities to purchase the combination of facilities and services that would enable them to serve customers most efficiently), limit the revenue opportunities of entrants (by restricting their ability to provide certain profitable services), or both. By doing this, such regulatory restrictions can be expected to impede or prevent competitive entry. These restrictions, in our view, are inconsistent with the requirements of the Telecommunications Act, and should be rejected for that reason. If the Commission determines that the restrictions are permitted but not required by the Act, it should reject them as well, on the basis of their profoundly anticompetitive effects.

The most dangerous of these restrictions are those that would limit the ability of entrants to purchase and use ILEC facilities to compete in the provision of exchange access services In our view, the development of competitive local exchange markets must go hand-in-hand with the development of competitive exchange access markets. The business of providing local exchange service to end users and the business of providing exchange access services to interexchange carriers are closely related; economies of scope are substantial.[12] Typically, the revenue streams from both services are needed to support the high cost of building and maintaining the common network elements that provide these services. Thus, new entrants into the local exchange markets that purchase these elements at cost or provide them directly will need the ability to earn revenues not only from the services provided to their end user customers, but also from exchange access services provided to connect their end user customers to interexchange carriers. The economics of a competitive marketplace would not support entry solely on the revenues derived from local exchange service.[13]

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[12] For a majority of customers the local exchange carrier provides a local loop which is used for both local service and exchange access for interexchange service.

[13] Every provider of local exchange service also provides switched access services when their customers make or receive interexchange calls. Some of the ILEC proposals, however, would channel some or all of the exchange access revenue from the interexchange carrier back to the ILEC if the new entrant was using any of the unbundled network elements from the ILEC.

A. The Commission Should Reject the Proposals to Limit Interexchange Carriers' Use of Interconnection and Access to Unbundled Elements under Section 251(c)(2)and (c)(3) To Provide Exchange and Exchange Access Services.

The Commission's Notice addresses whether the terms of sections 252(c)(2) and (c)(3) cover interconnection agreements between ILECs and providers of interexchange services. Notice ¶ 158.

The ILECs and Interexchange carriers have asserted radically different interpretations of this section as it might pertain to their use for providing exchange access for interexchange services. The ILECs' position is that interconnection and access to network elements under the cost standards of section 252 was intended by Congress to facilitate the development of facilities-based competition for local exchange services. They maintain that these rights were not intended to be available as a substitute for exchange access or to be used in a manner that would undermine the current access charge regime. If that were to be allowed, the ILECs maintain, the substantial contribution towards other services currently produced by access charges would disappear and would need to be made up from intrastate services.[14]

By contrast, the interexchange carriers maintain that the Act requires the ILECs to provide interexchange carriers interconnection for exchange access at cost based rates and that they are entitled to have access to unbundled network

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[14] See, e.g., Notice ¶ 161 n. 224 citing ILEC submissions.

elements in order to obtain exchange access on the most efficient basis. These carriers assert that the restructuring of access charges to a cost based system is an important feature of the Act. In addition, they contend that the contemplated entry of the BOCs into the interexchange market cannot take place without causing great harm to competition in the interexchange market unless the access charge system is restructured.

The Department believes that the Act permits all carriers, including interexchange carriers, to request interconnection from ILECs under section 251(c)(2) for use in providing exchange service and exchange access. Such carriers also are given the right to access unbundled network elements of the ILECs pursuant to section 251(c)(3) for use in connection with any telecommunications services which can be provided with such elements or combination of elements. Such interconnection and access to network elements is not limited to intrastate use, and thus the costs charged to requesting carriers should be determined on an unseparated basis. Accordingly, ILECs should not be allowed to charge additional interstate access charges for use of such interconnection arrangements or access to unbundled elements.

1. The Commission Should Not Prevent Interexchange Carriers From Obtaining Interconnection Pursuant to Section 251(c)(2) In Order To Provide Exchange Access.

Section 251(c)(2) establishes for ILECs:

> The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network . . . for the transmission and routing of telephone exchange service and exchange access."[15]

The Commission has tentatively concluded (Notice, ¶¶ 159-161) that while interexchange carriers are "telecommunications carriers" entitled under the Act to interconnect with the ILECs and to receive the exchange access they need to originate and terminate calls, they are not offering "exchange service" or "exchange access" when they seek solely to offer interexchange services to their customers. Under this interpretation of the Act, section 251(c)(2) would not allow an interexchange carrier to avoid interstate and intrastate access charges without entering the exchange service or exchange access markets; the right to interconnection under section 251(c)(2) would be limited by the phrase "for the transmission and routing of telephone exchange service and exchange access" and the statutory language would be read to require the interconnecting carrier to offer one of those services. This approach would not entail the immediate elimination of access charges paid to LECs for traffic terminated over their networks to their local customers.

This construction, in our view, is consistent with the promotion of competition in local exchange and exchange access markets. The contrary interpretation urged by some interexchange carriers would, in effect, directly replace the current interstate access charge regime by providing cost-based access

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15 Notice ¶ 49; 1996 Act, sec. 101, § 251(c)(2)(A).

to interexchange carriers, regardless of whether they had entered the market to provide exchange services or access services. The approach reflected in the Commission's tentative conclusion, by contrast, would allow interexchange carriers to participate fully in the provision of local exchange and access services, and would provide the rights conferred by section 251(c)(2) only when they do so. Access charges would not have to be paid to ILECs for origination and termination of interexchange traffic to local customers who have switched to a competing local provider of access services.

The Commission asks for comment on whether section 251(c)(2) permits interexchange carriers to request cost based interconnection for the purpose of *providing* exchange access, even if they will not also provide exchange service. The Department believes that the offering of either exchange access or exchange service should be sufficient.[16]

It has been suggested that this construction might permit a "back door" avoidance of access charges by an interexchange carrier declaring itself to be an exchange access provider in order to obtain interconnection under this section, then exclusively providing itself with exchange access.[17] The Commission has

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[16] Instances where the interconnection would be used for exchange access but not exchange service would most likely involve the provision of dedicated services. Such exchange access services may be either intrastate or interstate in nature. Notice ¶ 162.

[17] LEC white paper (April 1996 at 1) entitled *Customer and Use Restrictions & the Implementation of Section 251.* "Customer or use restrictions would be necessary because ... an IXC would otherwise be able to achieve indirectly the